

Letter of Findings Number: 07-0596
Sales and Use Tax
For the Tax Period 2007

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ISSUE

I. Sales and Use Tax - Imposition.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-5-9; IC § 6-2.5-5-27; IC § 6-6-6.5-8(d); [45 IAC 2.2-5-15](#); *Indiana Dep't of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

The Taxpayer protests the assessment of use tax on an airplane.

II. Tax Administration - Ten Percent Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2\(b\)\(c\)](#).

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The Taxpayer is a limited liability company that operated two airplanes as a charter service and purchased another airplane in 2006. The Taxpayer did not pay sales tax on the 2006 purchase. The Taxpayer applied for the public transportation exemption from the sales and use tax. The Indiana Department of Revenue, hereinafter referred to as the "Department," denied the exemption and assessed Indiana use tax, interest, and penalty on the airplane. The Taxpayer protested the assessment of use tax and penalty. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax – Imposition.

DISCUSSION

All tax assessments are presumed to be valid. IC § 6-8.1-5-1(c). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.* Exemption statutes are to be strictly construed against the Taxpayer. *Indiana Dep't of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

IC § 6-6-6.5-8(d) provides for the payment of sales or use tax on an airplane as follows:

A person shall pay the gross retail tax or use tax to the department on the earlier of:

- (1) The time the aircraft is registered; or
- (2) not later than thirty-one (31) days after the purchase date;

unless the person presents proof to the department that the gross retail tax or use tax has already been paid with respect to the purchase of the aircraft or proof that the taxes are inapplicable because of an exemption.

The Taxpayer applied for the public transportation exemption as stated at IC § 6-2.5-5-27 as follows:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

On the application for exemption from the sales and use tax, the Taxpayer marked that it was applying for an exemption for "Public Transportation operating under FAA Part 135." The application states that to receive this exemption, the Taxpayer must "submit copy of FAA Certificate for Public Transportation."

The Taxpayer did not submit the FAA Certificate as required. The Taxpayer argued that at the time of application it did not have the FAA Certificate due to unforeseen circumstances outside of their control. At the time of purchase of the subject aircraft, the Taxpayer's other planes were flying under the FAA 135 Certificate of another out-of-state company. Due to changes in the federal regulations and requirements concerning operational control of airplanes flying with FAA Part 135 certification, the out-of-state company was unable to add the Taxpayer's new aircraft to the FAA 135 Certificate of the out-of-state company. Therefore, the Taxpayer searched for another company with an active FAA 135 Certificate to purchase. The Taxpayer found such a company in a third state. The Taxpayer formed a related limited liability corporation to purchase the out-of-state company with the FAA 135 Certificate. The related company lists the subject airplane on its FAA 135 certificate. The Taxpayer leases the airplane to the related company with the FAA 135 Certificate to operate an air charter service.

The Taxpayer does not now and never has used the airplane to transport passengers for consideration under an FAA 135 Certificate. Therefore the Taxpayer's purchase and use of the airplane does not qualify for the public transportation exemption pursuant to IC § 6-2.5-5-27.

The Taxpayer alternatively argues that although the Taxpayer does not directly operate the airplane to carry passengers for consideration pursuant to an FAA 135 certificate, it does lease the airplane to the company that qualifies for the public transportation exemption. Therefore, if it does not qualify for the public transportation exemption, it qualifies for the purchase for leasing exemption.

The Taxpayer bases its claim for exemption on the following provisions of IC § 6-2.5-5-8 which states as

follows:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property....

The law concerning the exemption for rental to others is further explained at [45 IAC 2.2-5-15](#) as follows:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

- (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
- (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
- (3) The property is resold, rented or leased in the same form in which it was purchased.

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or value to the property through the rendition of services or performance of work with respect to such property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

In this case, the Taxpayer did not purchase the airplane for the purpose of leasing it to the related limited liability company. Therefore, the Taxpayer does not qualify for the purchase for leasing exemption pursuant to IC § 6-2.5-5-8. The Department properly imposed use tax pursuant to the provisions of IC § 6-6.6.5-8(d).

FINDING

The Taxpayer's protest to the assessment of use tax on its airplane is respectfully denied.

II. Tax Administration - Ten Percent Negligence Penalty.

DISCUSSION

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows: Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that its failure to pay the assessed use tax was due to reasonable cause rather than negligence.

FINDING

The Taxpayer's protest to the imposition of the penalty is sustained.

CONCLUSION

The Taxpayer's Issue I protest is denied and the Taxpayer's Issue II protest is sustained.

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